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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 411

CAULDWELL-WINGATE COMPANY, INC., POIRIER & MCLANE CORPORATION and PORT CHESTER ELECTRICAL CONSTRUCTION CORPORATION,

Petitioners and Appellees Below,

against

MARY E. PERSON, as Administratrix of the Goods, Chattels and Credits of WILLIAM S. PERSON, Deceased,

Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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October , 1949.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, three corporations organized under the laws of the State of New York, pray this Court for the issuance of a writ of certiorari to the United States Court of Appeals for the Second District, to review a decision of said Court dated the 5th day of July, 1949, which reversed a judgment of the U. S. District Court for the Southern District of New York, dated the 2nd day

of December, 1948, and remanded this cause for a new trial in accordance with its decision.

A petition for rehearing was denied on the 25th day of July, 1949.

Statement of the Matter Involved

This is an action at law brought in the U. S. District Court for the Southern District of New York by respondent herein against petitioners to recover damages for the death of her intestate alleged to have been caused through the negligence of the three petitioners.

The District Court acquired jurisdiction by reason of the diversity of citizenship between respondent and the petitioners.

Cauldwell-Wingate Company and Poirier-McLane Corp., as general contractors under a contract with the United States Army Engineers, erected and constructed Camp Shanks (a war training center) (fol. 14). The general contractors, subcontracted to Port Chester Electrical Construction Corp. (hereinafter referred to as Port Chester) the construction and installation of an outside electrical distribution system at the camp. The electrical distribution system was installed in accordance with plans and specifications of the U. S. Army Engineers (fol. 980). Part of that system was a pole known as pole #1422 which supported two high tension wires. The wires were supported on both sides of the pole by a bolt which ran through the pole. The pole was insulated at both ends of the wires by two dead end Bell insulators. The current was carried across the pole by a wire known as a jumper. It was at this pole, that respondent's intestate met his death. The pole had become electrified because in some unknown fashion, the jumper had come into contact with a metal plate to which a guy wire supporting the pole was attached (fol. 615).

The entire electrical distribution system including pole 1422 was completely installed on May 15, 1943 (fol. 988). From that date on, the contractors had no contact with the said electrical distribution system and were not again on the premises on Camp Shanks. The system was thereafter maintained, operated, repaired, inspected and supervised by the United States Government and its agents, servants and employees (fol. 534).

On August 6, 1946, respondent's intestate while in the employ of James E. Smith & Co., an independent contractor, climbed pole 1422, for the purpose of installing a temporary line to a building known as 041. He there met his death through electrocution.

A period of approximately three years and three months had elapsed between the date when petitioners had completed the electrical distribution system and delivered the same to the U. S. Army Engineers, who accepted it, and the date when the respondent's intestate climbed the pole and was killed.

The guy wire above the strain insulator had become energized with 2300 volts of electricity as a result of the jumper which had been installed by Port Chester, having in some unexplained manner sagged and come in contact with the metal plate attached to bolt to which the guy cable was fastened (fol. 564). The guy cable in question was bolted to the pole six inches below the primary line, and there was a plate or square washer used in connection with the through-bolt to which this guy cable was attached (4th paragraph of report of Clarence J. Burton, Defendant's Exhibit G).

When the jumper was installed, it was not fastened to a pole top pin or any similar device. During the period of three years while Burton was in charge of electrical maintenance in the camp, he periodically inspected the electrical system, including the high tension wires and

jumper fastened to Pole 1422, and at no time did he observe or find anything wrong with same (fol. 652).

Immediately after the accident when Burton examined the jumper, he found nothing wrong with it or with the clamps by which it was fastened to the high tension wires, and he replaced the bolt and jumper with a similar bolt and jumper and placed the new jumper in the same position the old jumper had been. The replaced jumper was still being used on Pole 1422 at the date of the trial (fols. 921-923).

When Burton replaced the jumper he did not fasten it to a pole top pin or side pole pin (fol. 923).

A strain insulator was built into the guy cable in question some eighteen or twenty feet above the ground. The purpose of this strain insulator was to protect the public from injury in the event the guy cable would become charged with electricity from the high tension wires (fol. 184).

There was not a scintilla of evidence adduced at the trial that the jumper was installed in violation of any electrical or municipal safety code, or was a hidden defect that could not be readily discerned by a casual inspection.

The trial was by jury, and at the close of respondent's case, petitioners rested and moved for a directed verdict, which motions were granted (fols. 1234-1245), and judgment was entered in favor of petitioners and against respondent on the 2nd day of December, 1948 (fols. 1255-1257).

Respondent appealed from said judgment to the United States Court of Appeals for the Second Circuit, which reversed the judgment of the lower court, and remanded this cause for a new trial in accordance with its opinion, which holds:

a. That the State of New York imposes the same duty towards a "business visitor" which it imposes upon the owner of land, on a contractor, who has negligently installed for the owner an electrical system, in acordance with plans and specifications furnished by the owner, after said contractor had completed the work, which had been inspected, approved, and accepted by the owner, who was in sole control of said electrical system at the time of the accident; and upon proof of original negligent installation, the contractor continues liable for damages sustained by such "business visitor" (pages 1642-43 of opinion).

b. That the subsequent negligence of the owner in not maintaining such system in a reasonably safe condition does not exonerate the contractor from liability, but such owner's negligence must be determined, as though such omission was innocent in itself (pages 1644-45 of opinion).

c. Applied the rule of *res ipsa loquitur* against a party who was not in control of the instrumentality which caused the injury.

Opinion Below

The District Court did not write an opinion. The opinion of this court of appeals is reported in 176 Fed. (2nd) 237

Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 240 (a) under the Judicial Code as amended.

The U. S. Court of Appeals remanded this case for retrial to be held in conformity with its decision which

has ruled upon the application of the State Law to the issues involved. It is contended that the Supreme Court has jurisdiction to review the judgment herein because such rulings are fundamental to the further conduct of this case and therefore should be reviewed on certiorari (*U. S.* v. *General Motors Corp.*, 323 U. S. 373); because the decision of the U. S. Court of Appeals is in conflict with the laws of the State of New York as established by the decisions of the New York Court of Appeals; and because it is also in conflict with the decisions of this Court in that it has been held in the Court below that a contractor who had negligently installed a dangerous instrumentality is independently liable in perpetuity thereafter for any injury resulting from a defect in the original installation; that this independent liability persists although the contractor, at the time of injury; did not own or operate, was not in control of and had no opportunity or duty to repair or maintain said instrumentality.

The decision of the U. S. Court of Appeals is in apparent conflict with the following decisions of the courts of the State of New York, and of this court. *Kilmer* v. *White*, 254 N. Y. 64; *Wilks* v. *New York Telephone Co.*, 243 N. Y. 351; *Zolezzi* v. *Bruce-Brown*, 243 N. Y. 490-498; *Covert* v. *Cranford*, 141 N. Y. 521; *Virginia Railway Co.* v. *Mullins*, 271 U. S. 220; *Western Union Telegraph Co.* v. *Poston*, 256 U. S. 662.

The question involved is important and the law as it now stands presents an apparently wide and irreconcilable conflict between the State and Federal laws on a fundamental and important principle of law.

Questions Presented

1. Is the decision of the U. S. Court of Appeals in conflict with the law established by the N. Y. Court of Appeals affecting the liability of a general contractor for original negligent construction?

2. Is the decision of the U. S. Court of Appeals in conflict with the New York laws as established by the N. Y. Court of Appeals, in holding that an electrical contractor, who has negligently installed and turned over to an owner an electrical distribution system, which had been inspected, approved and accepted by the owner, who thereafter remains in sole control of the instrumentality, liable to a "business visitor" of the owner for injuries sustained by such "business visitor" of the owner and that such contractor owes the same degree of care to such "business visitor" which is imposed upon the owner of the premises to a "business visitor"?

3. Is the decision of the Court of Appeals in conflict with the law of the State of New York in holding that the subsequent negligence of the owner in not maintaining an electrical system in a reasonably safe condition would not insulate the contractor who installed said system from liability, but such owner's negligence must be determined as though it was innocent in itself?

4. Is the decision of the Court of Appeals in conflict with the law of New York in holding under the facts of the instant case that the rule of *res ipsa loquitur* applied against a party who is not in possession or in control of the instrumentality which caused the injury.

Conclusion

As unquestionably the Court of Appeals has extended the contractor's liability to an extent not covered by New York State decisions, but in conflict with them, and since the questions presented are of general importance, because if decision below is sustained, every electrical contractor who installs a dangerous instrumentality when figuring the cost of an installation will have to take into consideration the necessity of protecting himself by continuing li-

ability insurance, and since the decision below conflicts with the decisions of the New York Court of Appeals on the questions involved, the petition for a writ of certiorari should be granted.

Dated, October 10, 1949.

Respectfully submitted,

WILLIAM A. DAVIDSON,
Attorney for Petitioners.

PETITIONERS' BRIEF

The facts are sufficiently stated in the petition.

Jurisdiction

If the decision of the U. S. Court of Appeals was a finding, only that a triable issue had been raised and that therefore the Trial Court erred in directing a verdict, this application would be unnecessary. However, the decision of the Court of Appeals has gone far beyond a direction for a new trial. It has held that in this case, that the contractor's duty was co-equal with that of a land owner towards a "business visitor"; that subsequent negligence of the owner would not insulate the contractor from liability and that the rule of *res ipsa loquitur* was applicable to a contractor who was not in control of the instrumentality causing the injury. The inclusion of such rulings in the decision establish the law of the case and thus become binding upon the District Court upon a retrial.

If, as claimed here, these rulings are wrong, petitioners' failure to appeal at this time would result in the great expense of another trial, the probability of a practically directed verdict against these defendants and subsequent appeals, necessitating in all probability, an appeal to this Court. It is apparent, therefore, that the correctness of these rulings of the Court of Appeals are so fundamental to the further conduct of this case that they should be reviewed on certiorari (*U. S.* v. *General Motors Corp.*, 323 U. S. 373).

This decision should also be reviewed because it is in conflict with the decisions of the N. Y. Court of Appeals and of this Court.

The U. S. Court of Appeals relied upon, but erred in applying, the facts and principles of law as stated in *Wilks*

v. *N. Y. Telephone Co.*, 243 N. Y. 351. In referring to the *Wilks* case, said Court stated:

> "The facts in the case were strikingly like those at bar" (p. 1643).

The facts stated by the New York Court of Appeals indicate the contrary. The U. S. Court of Appeals stated:

> "* * * the Federal Company had installed a dangerous wiring system upon its *own* property, * * *" (Italics supplied) (p. 1643).

But the New York Court of Appeals stated:

> "The complaint herein charges in effect that the Federal Telephone and Telegraph Company erected wires across the premises leased by the deceased *without permission or right* or easement and was a *trespasser on such premises;* * * *" (Italics supplied) (p. 357).

The *Wilks* case, therefore, involved a trespass and an apparently harmless telephone wire, and not a jumper required to be attached to a high tension wire.

Another vital distinction between the facts in the instant case and in the *Wilks* case is also apparent. The New York Court of Appeals stated:

> "The position of the Federal Telephone and Telegraph Company is different. It constructed a telephone system for operation *under a public franchise.* It was under a *duty to the public* to use care in the construction of its wires; it was under a similar *duty to use care in their maintenance.* It voluntarily conveyed its property to the New York Telephone Company" (p. 362) (Italics supplied).

Neither of the defendants in this case constructed the electrical system in question for their own use and opera-

tion or under a public franchise; the system was erected not for the use of the general public, but for the use of the War Department, and defendants had no right or duty to operate or maintain the system; and no voluntary conveyance was involved.

The New York Court of Appeals followed the law, which has been uniformly upheld in this jurisdiction, that, in order for a contractor to be liable in any event when he ceased to have control of the operation and maintenance of an instrumentality, it must be shown that the construction in question created a nuisance. It is respectfully submitted that the U. S. Court of Appeals erred in declaring that:

> "The fact that the Court called the wiring 'a nuisance' is not important in this action" (Opinion, p. 1643).

It was not only important, but vital that the wiring was determined to be a nuisance, for only then could the New York rule of perpetual liability in certain nuisance cases apply, as this rule does not apply to negligent construction by a contractor. *Covert* v. *Cranford,* 141 N. Y. 521; *Mayor* v. *Cunliff,* 2 N. Y. 174. In the instant case, the U. S. Court of Appeals has not determined that there was any evidence in the record to support a jury finding that the alleged defective construction constituted a nuisance, and plaintiff has not proceeded upon any theory of nuisance.

The U. S. Court of Appeals further applied the test of liability as established in actions where the injury occurred during the progress of the work, and not, as here, more than three years after the completion thereof and during the maintenance, operation and control by a third person, stating "That appears to us an altogether proper step to take" (p. 1642). It is submitted that the taking of the step is not a proper one. The law is clear that

"liability in tort is an incident to occupation or control". *Cullings* v. *Goetz*, 256 N. Y. 287, 290 (1931); *Muscelli* v. *Frederick Starr Contracting Co.*, 296 N. Y. 330 (1947); *Stein* v. *Pershing Square Bldg. Co.*, 191 Misc. 30; *Iacono* v. *Frank and Frank Contracting Co., Inc.*, 259 N. Y. 377 (1932).

The New York Court of Appeals in *Kilmer* v. *White*, 254 N. Y. 64, defined the liability of a person parting with the control of premises on which a nuisance exists. It held:

> "One's liability in negligence for the condition of land ceases when the premises pass out of one's control before injury results. Such is the general law. * * * To this rule certain exceptions arise. The landlord is liable if he leases premises for the use of the public when he knows that they are unsuited therefor. The nature of the use creates the duty. * * * Other conditions may give rise to other exceptions. If the landlord has been guilty of conscious deception or has covenanted to repair, he is not exempt from liability for dangerous conditions.
>
> "Another exception for the benefit of the third parties may be noted. 'A person who has been in possession and control of premises on which a nuisance exists, and then leases or in other manner parts with control of the premises under circumstances from which inference may be drawn that he authorized its continuance or profited therefrom, may be held liable for any damages suffered by reason of the continuance of the nuisance thereafter.' Zolezzi v. Bruce-Brown, 243 N. Y. 490.
>
> "A nuisance may be a dangerous condition due to negligence. * * * But from the act of transfer of title and possession in itself no inference can arise that the vendor either authorized the continuance of the dangerous condition or intended to profit thereby. Zolezzi v. Bruce-Brown, supra.

"The question thus arises as to the liability of the vendor for dangerous conditions existing at the time when he unqualifiedly transfers title and possession to the vendee. A proper rule applicable to such cases has been proposed in Tentative Draft No. 4 of the Restatement of the Law of Torts of the American Law Institute as follows:

" 'SECTION 222. General Rule of Non-Liability for Dangerous Conditions Existing at Time Vendor Transfers Possession. Except as stated in Section 223, a vendor of land is not subject to liability for bodily harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession.

" 'SECTION 223. Liabiliy for Concealed Dangerous Conditions Known to Vendor. A vendor of land who conceals or fails to disclose to his vendee any condition whether natural or artificial involving unreasonable risk to persons upon the land, is subject to liability for bodily harm caused thereby to the vendee and others upon the land in his right, after the vendee has taken possession, if (a) the vendee does not know of the conditions or the risk involved therein, and (b) the vendor knows of the condition and the risk involved therein and has reason to believe that the vendee will not discover the condition or realize the risk.' "

Clearly the jumper was not a concealed dangerous condition (fol. 193). Its existence was known to the government and its agencies because it had been inspected, approved and accepted by them, more than three years prior to the accident, and under the rulings of this case, these petitioners were clearly not liable for the injury sustained by respondent's intestate.

Inasmuch as the law of the State of New York governs the rule of liability, it is patent that the U. S. Court of Appeals misread and misapplied the law of liability.

Questions Presented

In dealing with the question of jurisdiction, we necessarily had to discuss the first two questions presented in this petition.

The third question is whether the decision at bar is in conflict with the State law in holding that the subsequent negligence of the owner would not insulate the contractor from liability.

In *Virginia Railway Co.* v. *Mullins,* 271 U. S. 220, this Court held:

> "Their maintenance and use during that period were exclusively in the hands of federal agents. If a duty rested on any one to make any change in them, it rested on the federal agents; and, if maintaining and using them without change was a wrong against the plaintiff, it was a wrong committed by those agents, for which no liability attached to the defendant."

The New York Court of Appeals in *Wilks* v. *New York Telephone Co.,* 243 N. Y. 357, quoted the foregoing and thereby made it the law of the State of New York.

The ruling of the trial court in directing a verdict was correct for the reason that the uncontradicted proof in the case showed that at the time of the accident, this pole and its equipment were in the sole control of a government agency and not in the control of any one of the defendants.

The fourth question presented deals with the rule of *res ipsa loquitur.* With the exception of the fact that the

Port Chester Electrical Construction Corp. installed the jumper, there is absolutely no evidence in the record as to when or why the jumper sagged and energized the guy cable. Respondent adduced no evidence as to the position of the jumper at the time it was installed and accepted. Burton testified that he could not tell and nobody would know why the jumper sagged (fols. 563-564). The only complaint concerning the construction of this jumper was that it was not fastened to a pole top pin. Burton, when he replaced the existing jumper, did not fasten same to a pole top pin (fols. 922-923), and testified that such installation was good construction.

Respondent admits that the accident occurred over three years after the work was accepted by and after it went into the sole control of the government. Yet, the Court of Appeals held that the sagging of the jumper was sufficient *prima facie* evidence to prove negligence on the part of petitioners, because of foreseeability that such a sagging was possible and that at some future time, a business visitor of the government might climb the pole and be injured thereby. In other words, it held that the happening of the accident was *prima facie* proof of negligence on the part of these petitioners and placed upon them the burden of explaining why the jumper sagged, although they were not in control of same and had had no opportunity for some three years to inspect or maintain same.

The New York Law on the application of this doctrine is stated in the case of *Breen* v. *N. Y. Central and H. R. R. Co.*, 109 N. Y. 297. As control is essential, it clearly follows that the decision of the Court of Appeals in ruling as it did, is in conflict with same.

A further reason why this petition should be granted and the decision reviewed is because this case is of great interest not only to contractors in the State of New York, but to contractors throughout the United States. This

Court will take judicial notice that when a general contractor undertakes the installation of work of the kind involved in this case, that he protects himself and his employer by liability insurance, from any and all liability for accidents that may occur during the progress of the work, and that he includes the cost of such insurance in the contract price. Such insurance protects the contractor only during the progress of the work and does not protect him from the moment the work is accepted and turned over to the owner. Under the ruling of the Court of Appeals, a prudent contractor would have to carry liability insurance for all future periods during which the installation made by him would be in use. This would necessarily entail inclusion in the contract price of a large sum of money for future protection from liability. This certainly has not been the business practice in the past, and should not become necessary in the future, because it has been a recognized principle of the law of negligence that liability for all accidents which occur after the work is completed and while the instrumentality is in possession of the owner, that the latter and no one else is responsible for the negligent maintenance of such instrumentality.

Conclusion

Since it is patent that the Court of Appeals erred in reversing the judgment of the District Court and holding as above stated, and since the questions presented are of general importance, and since the decision below conflicts with the law of the State of New York in several material respects, this petition for a writ of certiorari should be granted.

Respectfully submitted,

William A. Davidson,
Attorney for Petitioners.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

On the bottom of page 12 and the top of page 13 of her brief, respondent states that her case is not based upon the theory of nuisance, but is based solely on the theory of negligence.

Petitioners claim that the U. S. Court of Appeals erred in ruling as it did, even if assuming that petitioners, when they installed the jumper, created a nuisance.

On October 31st, 1949, the Appellate Division of the Supreme Court, Second Department, decided the case of

Brown, Respondent v. *Welsbach Corporation, and others Appellants,* which decision was reported in the New York Law Journal on November 1st, 1949, and has not yet been officially reported. For the convenience of the Court, we are quoting this decision in full:

> "Action to recover damages for injuries sustained as the result of alleged negligence of defendant, The Welsbach Corporation, in negligently constructing and maintaining a sidewalk over a lamp post foundation. Judgment for plaintiff, in so far as appealed from, reversed on the law with costs, and complaint dismissed on the law, with costs. The accident, involving a fall on a then exposed hole seven inches in diameter and five feet deep, occurred on September 14, 1947. Assuming negligence of said defendant in construction of the concrete covering over the foundation, it could not be held liable in the light of the acceptance by the City of New York of the work after its completion on January 23, 1947 (Coleman v. Guidone & Son, Inc., 192 App. Div. 120). In any event the contract between said defendant and the City of New York, incident to which the work was performed, had expired as of June 30, 1947, and hence defendant had no supervisory power and was out of control and no longer liable at the time of the accident under the applicable general rule at common law. (The Mayor, &c., of Albany v. Cunliff, 2 N. Y. 165; Cullings v. Goetz, 256 N. Y. 287, 290; Cunningham v. T. A. Gillespie Co., 241 Mass. 280; Board of Education, Union Free School District No. 6 of Town of North Hempstead v. Town of North Hempstead, 259 App. Div. 733.) This is not a case which is within the exceptions to the foregoing well-settled rule, which are (a) where there was retention of a financial interest (Covert v. Cranford, 141 N. Y. 521, 527; Swords v. Edgar, 59 N. Y. 28, 35); (b) Concealment of a defect (Kilmer v. White, 254 N. Y. 64,

70); or (c) lack of reasonable opportunity by a successor in control to discover the condition on prompt inspection (Pharm v. Lituchy, 283 N. Y. 130, 132). Findings of fact implicit in the jury's verdict are affirmed."

The facts in the instant case, while not entirely similar, are so analogous that the reasoning in the cited decision clearly applies. Assuming negligence of petitioners in the construction of the jumper, they cannot be held liable in the light of the acceptance by the Government of their work after its completion in May, 1943, because the contract between these petitioners and the Government, incident to which the work was performed, had been completed and hence these petitioners had no supervisory power and were out of control and no longer liable at the time of the accident under the applicable general rule at common law.

As argued in our main brief, this is not a case which is within the exceptions to the following well-settled rules, which are:

a. Where there was retention of a financial interest;

b. Concealment of a defect;

c. Lack of reasonable opportunity by a successor to discover the condition on prompt inspection.

The foregoing decision restates the law of the State of New York applicable to the facts in the instant case and conflicts with the interpretation of the New York law made by the U. S. Court of Appeals in the instant case.

Respectfully submitted,

WILLIAM A. DAVIDSON,
Attorney for Petitioners.